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Attorneys for Defendants
BELMONT VILLAGE SUNNYVALE, INC.,
BELMONT CORP, AND BELMONT VILLAGE L.P.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

RMW

1711 PVT

SALVADORE TEMORES,

Plaintiff,

vs.

BELMONT VILLAGE SUNNYVALE,
INC., a California Corporation;
BELMONT CORP, a Maryland
Corporation; BELMONT VILLAGE, and
DOES 1-25, inclusive,

Defendants.

CASE NO.

[Santa Clara County Superior Court Case No.
108CV106332]

DEFENDANTS' NOTICE OF REMOVAL

1 TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE
2 NORTHERN DISTRICT OF CALIFORNIA, PLAINTIFF SALVADORE TEMORES AND TO
3 HIS ATTORNEY OF RECORD, ASHWIN LADVA, ESQ. AND THE LADVA LAW FIRM:
4

5 PLEASE TAKE NOTICE THAT Defendants Belmont Village Sunnyvale, Inc.,
6 Belmont Village, L.P., and BelmontCorp ("Petitioners/Defendants") hereby remove this action
7 from the Superior Court of the State of California for the County of Santa Clara to the United
8 States District Court for the Northern District of California. This removal is based on diversity of
9 citizenship, pursuant to 28 U.S.C. Sections 1332 and 1441(a) and (b), for the reasons stated
10 below:
11

12 1. On or about February 21, 2008, plaintiff Salvadore Temores ("Plaintiff")
13 filed a Complaint in the Superior Court of the State of California for the County of Santa Clara
14 entitled: "*Salvadore Temores v. Belmont Village Sunnyvale, Inc., a California Corporation;*
15 *BelmontCorp, a Maryland Corporation; Belmont Village and DOES 1-25, inclusive,*" designated
16 as Case No. 1-08-CV 106332 ("Complaint"). The Complaint alleges the following 6 purported
17 causes of action: (1) "For Willful Violations of California Labor Code §§ 510 and 204 – Failure
18 to Pay All Wages and Overtime Under California Law," (2) "For Willful Violations of California
19 Labor Code §§ 201, 202, and 203 – Failure to Pay Wages Upon Discharge or Quitting; Waiting
20 Time Penalties," (3) "For Willful Violations of California Labor Code § 226.7 – Failure to Afford
21 Mandatory Breaks or Meal Periods as Required by IWC Orders and Labor Code," (4) "For
22 Willful Violations of Labor Code §226 – Failure to Maintain Pay Records; Failure to Make Pay
23 Records Available Upon Request," (5) "For Violations of California Business and Professions
24 Code Sections 17200, *et seq.* Based Upon Defendants' Unfair Business Acts and Practices," and
25 (6) For Declaratory Relief. A copy of the Summons and Complaint are attached as Exhibit "A"
26 to the Declaration of Shannon S. Sevey ("Sevey Declaration").
27
28

1 2. On February 27, 2008, Plaintiff, through his counsel, caused a copy of the
2 Summons, Complaint, and Civil Case Information Sheet to be served on Defendant Belmont
3 Village Sunnyvale, Inc.. See Exhibit "A" to Sevey Declaration. The Complaint is the initial
4 pleading setting forth the claim for relief upon which this action is based and may be removed.
5 No other initial pleadings were received by Petitioners/Defendants prior to February 27, 2008.
6 Accordingly, this Notice of Removal is being filed within thirty (30) days after receipt by
7 Petitioners/Defendants of the initial pleading and is timely filed pursuant to 28 U.S.C. Section
8 1446(b).

9
10 3. On March 10, 2008, Defendant BelmontCorp served on Plaintiff a Notice
11 of Deposition and Requests for Production of Documents. See ¶ 4 of Sevey Declaration and
12 Exhibit "B" thereto.

13
14 4. On March 28, 2008, Petitioners/Defendants filed their Answer in the
15 Superior Court of California for the County of Santa Clara. See ¶ 5 of Sevey Declaration and
16 Exhibit "C" thereto.

17
18 5. Notice of this removal is being given to both the adverse party and the state
19 court pursuant to 28 U.S.C. Section 1446(d). See ¶ 6 of Sevey Declaration and Exhibits "D" and
20 "E" attached thereto. Exhibits "A" – "E" constitute all process, pleadings and orders served on or
21 by Petitioners/Defendants in this action.

22
23 6. The Complaint, and each alleged cause of action contained therein, may be
24 properly removed on the basis of diversity of citizenship jurisdiction, in that it is a civil action
25 between citizens of different states and the matter in controversy exceeds the sum of \$75,000,
26 exclusive of interest and costs. 28 U.S.C. § 1332.

1 (a) Petitioners/Defendants are informed and believe, and on that basis
2 allege, that Plaintiff is now, and was at the time this action was commenced, a citizen of the State
3 of California within the meaning of 28 U.S.C. Section 1332(a), because his place of residence and
4 domicile is and was within the State of California. See Complaint ¶ 1 (alleging that Plaintiff is
5 currently and at all times mentioned herein was, a resident of the State of California).

6
7 (b) Petitioner/Defendant Belmont Village, L.P. is now, and was at the
8 time this action was commenced, a citizen of the State of Texas and the State of Delaware within
9 the meaning of 28 U.S.C. Section 1332(c)(1), because it is now and was at all material times
10 formed under the laws of the State of Delaware, it maintains, and at all material times maintained,
11 its principal place of business in the State of Texas, and its General and Limited Partners are and
12 were at all material times formed under the laws of the State of Delaware and maintain, and at all
13 material times maintained, their principal place of business in the State of Texas. See ¶ 5 of the
14 Declaration of Ann Schumacher ("Schumacher Declaration").

15
16 (c) Petitioner/Defendant Belmont Village Sunnyvale, Inc., although a
17 citizen of the State of California, is a sham defendant because, as set forth below, it cannot be
18 held liable for any of the causes of action asserted against it in Plaintiff's Complaint.
19 Accordingly, its presence does not destroy diversity. Morris v. Princess Cruises, Inc., 236 F.3d
20 1061, 1067 (9th Cir. 2001) (joinder of non-diverse defendant is fraudulent, and does not destroy
21 diversity, where "the plaintiff fails to state a cause of action against a resident defendant, and the
22 failure is obvious according to the settled rules of the state"); McCabe v. General Foods Corp.,
23 811 F.2d 1336, 1339 (9th Cir. 1987) (former employee failed to state a cause of action under
24 California law against his individual supervisors; thus their joinder as defendants did not destroy
25 diversity); Scopas v. Armstrong World Indus., 114 L.R.R.M. (BNA) 2933, 2934-35 (C.D. Cal.
26 1983), aff'd, 770 F.2d 171 (9th Cir. 1985) (discharged employee's joinder of former supervisor as
27 a non-diverse party was fraudulent; plaintiff could state no valid cause of action against him).

1 (d) Plaintiff asserts 6 purported causes of action against Belmont
2 Village Sunnyvale, Inc.: (1) "For Willful Violations of California Labor Code §§ 510 and 204 –
3 Failure to Pay All Wages and Overtime Under California Law," (2) "For Willful Violations of
4 California Labor Code §§ 201, 202, and 203 – Failure to Pay Wages Upon Discharge or Quitting;
5 Waiting Time Penalties," (3) "For Willful Violations of California Labor Code § 226.7 – Failure
6 to Afford Mandatory Breaks or Meal Periods as Required by IWC Orders and Labor Code," (4)
7 "For Willful Violations of Labor Code §226 – Failure to Maintain Pay Records; Failure to Make
8 Pay Records Available Upon Request," (5) "For Violations of California Business and
9 Professions Code Sections 17200, *et seq.* Based Upon Defendants' Unfair Business Acts and
10 Practices," and (6) For Declaratory Relief.

11
12 (e) The purported causes of action under the California Labor Code,
13 including Sections 201-204, 226, 226.7, and 510, may only be brought against Plaintiff's
14 employer, not non-employer entities. See California Labor Code §§ 201-204, 226, 226.7, 510
15 (setting forth obligations *employers* must follow).

16
17 (f) The purported cause of action for Unfair Business Acts pursuant to
18 California Business & Professions Code § 17200 fails against as a matter of law because it is
19 based entirely on alleged violations of California Labor Code Sections 201-204, 226, 226.7, and
20 510, which, as set forth above, can only be committed by the employer. Id.

21
22 (g) "If the Plaintiff fails to state a cause of action against a resident
23 defendant . . . the joinder of the resident defendant is fraudulent." McCabe, 811 F.2d at 1339
24 (citation omitted). Accordingly, for purposes of removal, the citizenship of Belmont Village
25 Sunnyvale, Inc. should be disregarded.

1 (h) Although Petitioner/Defendant BelmontCorp is not a citizen of the
2 State of California, like Belmont Village Sunnyvale, Inc., it is not Plaintiff's employer. Thus, its
3 citizenship should also be disregarded. See ¶ 3 of Schumacher Declaration.

4
5 (i) The presence of Doe defendants in this case has no bearing on
6 diversity with respect to removal. See 28 U.S.C. § 1441(a) ("For purposes of removal under this
7 chapter, the citizenship of defendants sued under fictitious names shall be disregarded.").

8
9 (j) Plaintiff's Complaint seeks an unspecified amount of general
10 damages, special damages, penalties, costs, and attorneys' fees in connection with the causes of
11 action set forth in his Complaint. See ¶ 2 of Sevey Declaration and Exhibit "A" thereto.
12 Plaintiff's failure to specify in his Complaint the amount of damages he seeks, however, does not
13 deprive this Court of jurisdiction. See White v. J.C. Penney Life Ins. Co., 861 F. Supp. 25, 26
14 (S.D. W.Va. 1994) (defendant may remove a suit to federal court notwithstanding the failure of
15 plaintiff to plead a specific dollar amount in controversy; if the rules were otherwise, "any
16 plaintiff could avoid removal simply by declining . . . to place a specific dollar value upon its
17 claim."). Based on the nature of the allegations and the damages sought, Plaintiff has placed in
18 controversy an amount exceeding \$75,000, exclusive of costs and interests. See ¶ 2 of Sevey
19 Declaration and Exhibit "A" thereto. In determining whether a complaint meets the \$75,000
20 threshold of 28 U.S.C. Section 1332(a), a court may consider the aggregate value of claims for
21 compensatory and punitive damages, as well as attorneys' fees. See, e.g., Bell v. Preferred Life
22 Ass. Soc'y, 320 U.S. 238, 240, 64 S. Ct. 5 (1943) ("Where both actual and punitive damages are
23 recoverable under a complaint each must be considered to the extent claimed in determining
24 jurisdictional amount.") (footnote omitted); Goldberg v. CPC Int'l, Inc., 678 F.2d 1365, 1367 (9th
25 Cir.) cert. denied, 459 U.S. 945 (1982) (attorneys' fees may be taken into account to determine
26 jurisdictional amount).

1 (k) Further, Petitioners/Defendants believe the amount in controversy
2 exceeds \$75,000 based on the following facts: (1) Plaintiff alleges that he is entitled to receive
3 overtime wages; (2) Plaintiff's regular rate of pay was \$26.44 (Plaintiff's annual base salary of
4 \$55,000 divided by 2,080 hours per year), and thus his overtime rate, equal to 1.5 times his
5 regular rate of pay, was \$39.66; (3) assuming Plaintiff alleges he worked as little as 10 hours of
6 overtime per week, this would mean that Plaintiff seeks at least \$20,623.20 per year in overtime
7 wages (calculated as \$39.66 times 10 hours per week times 52 weeks per year); (4) as a result of
8 Plaintiff's claim under California Business & Professions Code § 17200, which, pursuant to
9 California Business & Professions Code § 17208, is governed by a four-year statute of limitation,
10 the total overtime sought conservatively equals or exceeds \$82,492.80 (\$20,623.20 per year
11 multiplied by four years); and (5) this figure does not include amounts Plaintiff will seek to
12 recover for penalties and attorneys' fees, which further increase the amount in controversy.

13
14 7. Because Plaintiff and Petitioner/Defendant Belmont Village, L.P. are
15 citizens of different states, and because the Court may disregard the citizenship of non-employers
16 Belmont Village Sunnyvale, Inc., BelmontCorp, and the Doe defendants, there is complete
17 diversity between the parties. Further, because there is complete diversity and because the
18 amount in controversy threshold is met, the requirements for removal under 28 U.S.C.
19 Sections 1332(a) and 1441(a) are satisfied.

20
21 WHEREFORE, Petitioners/Defendants remove the above-entitled action now
22 pending in the Superior Court of the State of California for the County of Santa Clara to this
23 Court.

1 DATED: March 28, 2008

2 PAUL, HASTINGS, JANOFSKY & WALKER LLP
3 ELENA R. BACA
4 SHANNON S. SEVEY

5 By: 

6 SHANNON S. SEVEY

7 Attorneys for Defendants
8 BELMONT VILLAGE SUNNYVALE, INC.,
9 BELMONTCORP, AND BELMONT VILLAGE L.P.
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